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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~1822~~ 70-277

No.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL NO. 1,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The International Association of Bridge, Structural and Ornamental Iron Wrokers, Local No. 1 (hereinafter referred to as "the Union"), by its attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing the order of dismissal entered by the district court and remanding the case for trial.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 25-32) is reported at 438 F. 2d 679. The district court did not issue an opinion; its order appears in the Appendix, *supra*, pp. 34-34.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 27, 1971. The Union's petition for rehearing was denied on March 16, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Section 707(a) of the Civil Rights Act of 1964 empowers the Attorney General to bring an action thereunder only in the limited circumstances where he has "reasonable cause to believe" that a person or group of persons is engaged in a "pattern or practice" of discriminatory conduct.

(a) May the Attorney General bring and maintain such an action merely upon his bare assertion that "reasonable cause" exists, or does the defendant have the right to inquire into whether the Attorney General does in fact have "reasonable cause"?

(b) Does the defendant in such an action have the right to have the complaint dismissed if the Attorney General refuses to, or cannot, show that he had "reasonable cause to believe" that a violation of the Act had occurred at the time the complaint was filed?

2. Where the District Court, after several warnings, dismissed the Government's complaint because the Attorney General repeatedly refused to produce documents pursuant to a trial subpoena duces tecum on his claim that the documents were privileged, and declined to submit those documents to the trial judge for *in camera* inspection so the latter could determine if there was any merit to the Attorney General's claim of privilege, did the Court of Appeals err by reversing the District Court and remanding the case with instructions that the Attorney General be given still another chance to substantiate his claim of privilege by submitting the documents to the trial judge for *in camera* inspection?

STATUTE INVOLVED.

Section 707(a) of Title VII of the Civil Rights Act of 1964 (P. L. 88-352, Title VII, § 707(a), July 2, 1964, 78 Stat. 261; 42 U. S. C. § 2000 e-6(a)), provides as follows:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

STATEMENT.

A. The District Court Proceedings.

On April 12, 1968, the Attorney General filed suit against the Union under Section 707(a) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-6(a)). The complaint alleged that the Union controls a "substantial portion" of the job opportunities in the iron work trade within its geographic jurisdiction, and that it "has pursued and continues to pursue a policy and practice of discriminating against Negroes, on account of their race, with respect to Union membership and employment opportunities in the ornamental and structural ironwork trade" (Vol. I, Item 4, para. 1).[1] This alleged "policy and practice" of discrimination was allegedly implemented by "failing and refusing to recruit and accept Negroes as members . . . upon the same basis as white persons are recruited and accepted; . . . refusing to refer or authorize Negroes for work on the same basis as white persons are referred or authorized; . . . [and] failing and refusing to take reasonable steps to eliminate the effects of its previous policies and practices of discrimination on the basis of race" (Vol. I, Item 2, para. 8).

At the outset, the Union moved to dismiss the complaint on the ground, *inter alia,* that the Attorney General's

1. On motion of the Attorney General, the Court of Appeals heard this case on the original record without benefit of a printed appendix. The record on appeal consisted of two volumes of pleadings, eight volumes of depositions and twenty-three volumes of transcript of proceedings. Petitioner will use the same method of record citations here as was used by both parties in the court below: references to "Vol. ...., Item ....," are to the numbered documents contained in the two volumes of pleadings filed by the Clerk of the District Court with the Court of Appeals; "Tr." references are to the twenty-three volumes of transcript of proceedings, each one identified by the date the proceeding took place; and references to depositions, if any, are identified by the name of the deponent.

failure to allege and set forth "reasonable cause to believe" as required by the statute prevented the Court from acquiring jurisdiction (Vol. I, Item 4, para. 1). The Government opposed the motion to dismiss, arguing that there was a presumption of administrative regularity, and that the Attorney General's signature on the complaint which certified his belief of the truth of its allegations were sufficient as an initial matter to invoke the Court's jurisdiction (Tr. 5/28/68, pp. 23-24). Government counsel agreed, however, that Union could use discovery procedures under the Federal Rules to determine whether the Attorney General did in fact have reasonable cause to believe that the Union was in violation of the Act (*id.*, at 24-25). The Court thereupon denied the Union's motion to dismiss (Vol. I, Item 5), and the parties began their discovery proceedings.

On September 16, 1968, the Union served a set of interrogatories on the Government (Vol. I, Item 8). Interrogatory No. 11(c) asked:

> Set forth all facts you had knowledge of prior to the filing of the Complaint upon which said finding or determination [of reasonable cause] was based.

And, in Interrogatory No. 52, the Union asked:

> State and specify all memoranda, correspondence or other documents which contain relevant information concerning the issues in this case as presently known to the Department of Justice and the whereabouts of all such memoranda, correspondence or other documents and the name and address of the person having control or custody thereof.

The Government, without objection, answered Interrogatory No. 52 on October 3, 1968, with a detailed list of the memoranda, letters, statements, reports and affidavits it had which "contain[ed] relevant information concerning the issues in this case as presently known to the Depart-

ment of Justice'' (Vol. II, Item 36, pp. 37-39). Among the memoranda the Government listed were four dated February 6, March 28, April 3 and 4, 1968, which it identified as having been ''prepared by attorneys of the Civil Rights Division summarizing available information concerning Local One and its Joint Apprenticeship Committee and making recommendations regarding actions to be taken'' (Vol. II, Item 36, p. 39).

While voluntarily answering Interrogatory No. 52, the Government objected to Interrogatory No. 11 on the ground that the question of whether the Attorney General in fact had reasonable cause to bring the action, as required by the Act, was not a litigable matter (Tr. 9/26/28, pp. 9-10, 13-14; Tr. 10/7/68, pp. 4-14). The District Court overruled the Government's objection and directed that Interrogatory No. 11 be answered (Tr. 10/7/68, p. 28). The Government complied with the order and set forth the alleged facts upon which the Attorney General's ''reasonable cause to believe'' was predicated (Vol. I, Item 11).

On July 22, 1969, after discovery proceedings had been closed and the Union had had an opportunity to analyze all the information procured from the Government, it filed another motion to dismiss on the ground that at the time the complaint was filed, the Attorney General did not have reasonable cause to believe the Union had violated Section 707(a) of the Act (Vol. I, Item 16). The motion was predicated upon the Government's answers to the Union's interrogatories, setting forth the facts upon which the Attorney General allegedly predicated his determination of reasonable cause. Those answers disclosed that at the time he filed the complaint, the Attorney General had virtually no knowledge of the membership, structure and operation of the Union and its role in procuring jobs in the iron work industry in the Chicago area, and that he had no evidence of a pattern or practice of discrimination

against Negroes by the Union since the effective date of the Act. See Vol. I, Item 11; Tr. 8/6/69, pp. 88-168. The Government's answers further disclosed that the reason the Attorney General filed the Complaint was because the Union had failed to permit the FBI to go through its books and records in order to determine whether reasonable cause existed, and the Government hoped to use the pre-trial discovery provisions of the Federal Rules of Civil Procedure to force the Union to produce the information it sought (Vol. I, Item 11, 11.3-4; Vol. II, Item 36, pp. 7-9, 10-11, 13-14, 15-16, 23-24).

The District Court postponed consideration of the motion to dismiss until the first day of the trial, which at that time was scheduled to begin July 28. Preparing for the possibility that the motion to dismiss would be denied, the Union also served on the Government a trial subpoena duces tecum for a number of documents identified by the Government in its answer to Interrogatory No. 52 as "contain[ing] relevant information concerning the issues in this case as presently known to the Department of Justice" (Vol. I, Item 17, Attachment A). Among such materials sought were: (1) a written statement taken by the Government from one person, and memoranda of interviews with seventeen others; (2) four memoranda prepared by attorneys of the Civil Rights Division "summarizing available information concerning Local One and its Joint Apprenticeship Committee and making recommendations regarding actions to be taken"; and (3) investigative reports prepared by Government agents in the case (*ibid.*). The Union had previously sought to inspect and copy these documents during the discovery phase of the litigation by means of a motion to compel production, under Rule 34, F. R. Civ. P. (Vol. I, Item 14). This motion had been filed on June 26, 1969, and denied by the trial court on June 27 "without prejudice to the right of the defendant to

have such documents produced at trial if any of the persons named in the said motion and attachment thereto are called as witnesses or the defendant shows other good cause for the production of said documents" (Vol. I, Item 15, P. 2).

On July 25, the Government moved to quash the above-described items of the trial subpoena, contending that the Court's order of June 27 had already denied their production before trial, and that these documents constituted the work product of Government attorneys (Vol. I, Item 17). The Court heard the Government's motion to quash on July 28. Presenting his argument, Government counsel initially objected to producing memoranda of interviews, and statements, of potential witnesses (Tr. 7/28/69, pp. 24-25). Judge Perry interrupted and said that when he denied the Union's motion to produce those statements on June 27 [*ibid.*]:

> I was thinking of this case in terms of a criminal case. * * * I was thinking of Section 3500 and that the time they were entitled to receive this would be at the end of the witness' testimony. * * * I do not know why the civil rules should not apply and I do not know why they should not have these. I think I was in error in not letting them have them in the very beginning.

Government counsel replied (*ibid.*):

> Well, as far as we are concerned, these are squarely within the work product doctrine of *Hickman* v. *Taylor* [329 U. S. 495 (1947)].

The District Court rejected this assertion, stating that the policy of disclosure had been considerably liberalized since the *Hickman* decision (*id.*, at 26).

Judge Perry then directed counsel to go on to his next point, and Government counsel said, "Judge, may I simply

inquire, does this also cover our notes?'' (*id.*, at 27). The court replied (*id.*, at 27-28):

> Oh, no, no, it does not. * * * It is the statement of the witnesses that I am after, not the opinion. I will not include in that the opinion of the attorney who is trying the case. I would not expect you to produce what conclusion he arrived at; but if he made a memorandum of facts, that should be delivered. It does not make any difference whether the attorney does it or not, when you make a memorandum of facts.

Counsel for the Union then pointed out that the memoranda of the Government attorneys should be produced because there might be relevant facts set forth therein which have not otherwise been disclosed (*id.*, at 30). To this, Judge Perry replied (*ibid.*):

> Well, I will solve it. Just produce that for me and I will decide on it at the time, whether it is to be delivered to you or not. * * * Let them produce it, just like you are producing some things. Let them produce it, have it available, and then I will pass on it at the time of the trial; because I am of the opinion that most of that right now would be work product and not admissible; but it may be, after I look at it. * * * I will reserve ruling on that one, but produce it.

Having thus ruled on items (1) and (2) of the Union's trial subpoena, the Court turned to item (3), the Government agents' investigative reports. The Government argued they were privileged because ''they are the reports and the interviews done by the FBI agents'' (*id.*, at 31). Judge Perry replied (*ibid.*):

> That does not make any difference. The FBI is no holier than an ordinary investigative body, as far as that is concerned, when it comes to producing the records. This is a civil trial. That does not make any difference. They lose their halo when they get here in court.

The Government argued that the FBI interviews were done "in accordance with questions that we give them, based upon our theory of the case and our analysis." The Court rejected this argument, saying (*id.*, at 31-32):

> All right, then that will be the ruling. I do not think it is necessary to make any detailed written order on this. Let the record show that with certain exceptions the objections to the motions—in each instance let the motion to quash be denied. Show it with reservations of the Court in some instances, to review the material before it is submitted for evidence. That will cover it.

An order was entered to that effect, which also continued the trial date and hearing on the Union's motion to dismiss to August 7 (Vol. II, Item 77).

On August 6, the Government filed a motion to modify the Union's trial subpoena duces tecum by striking therefrom paragraph (2), which requires the production of the four attorney memoranda discussed in court on July 28 (Vol. I, Item 20). As ground for its motion, the Government asserted that a Department of Justice rule (28 C.F.R. Secs. 16.12-16.14) prohibits its employees from making any of its documents available to a court or other tribunal unless the Attorney General gives his permission, and the Attorney General in this case had directed counsel not to produce the four documents.

A hearing was conducted on the motion to modify the trial subpoena duces tecum on August 6. Contrary to its Answer to Interrogatory No. 52, where it identified these four memoranda as containing "relevant information concerning the issues in this case" (Vol. II, Item 36, pp. 37, 39), the Government now asserted that the four memoranda dealt only with "reasonable cause", and again asked the court to rule that "reasonable cause" was not subject to discovery and was not a litigable issue (Tr. 8/6/69, pp. 4-6, 20-21). Judge Perry agreed to permit reargument and,

after hearing, reaffirmed his earlier ruling that "reasonable cause" was a litigable issue (*id.*, at 58-59, 62).

During its argument in opposition to the Government's motion to modify the subpoena, the Union cross-moved that the complaint be dismissed with prejudice for the wilful refusal of the Government to comply therewith (*id.*, at 69). The Court took both the motion to modify the subpoena and the motion to dismiss under advisement, and then turned to the Union's pending motion to dismiss for lack of reasonable cause (*id.*, at 81, 88). After hearing argument on that motion, the Court turned to Government counsel to ascertain whether "the Attorney General persists now in his refusal to disclose those four documents which, if I had before me and counsel had it, might very well show that he had reason" (Tr. 8/7/69, p. 218). When Government counsel answered in the affirmative, the Court said (*id.*, at 219):

> Well, the Attorney General leaves me no alternative but to grant the joint motion and dismiss this cause with prejudice.
>
> If the Attorney General is not willing to produce the documents that the Court has ordered to be produced here on this motion and for use in this trial, I think he cannot be heard to persist in prosecuting this case.
>
> I will grant the motion. So the motion is granted. The cause is dismissed with prejudice, gentlemen.

In the minute order Judge Perry drafted and entered that day, he said (Vol. I, Item 21):

> This cause coming on upon the motions of defendant to dismiss this cause for failure of the plaintiff to show that the Attorney General had reasonable grounds or cause to institute this action against the defendant and further for the refusal of the plaintiff to produce four documents upon which the Attorney General relied for reasonable cause after they had

been subpoenaed by defendant and ordered to be produced by the Court, said refusal being based upon the claim of Executive Privilege asserted and ordered by the Attorney General.

The Court thereupon has considered said motions and response thereto and heard argument of counsel for the parties and now finds as follows:

The plaintiff has followed and continues to follow the instruction of the Attorney General and has refused and continues to refuse to produce said four documents for inspection by counsel for the defendant or the Court and has continued to and continues to assert the Attorney General's claim of Executive Privilege as to said four documents, the four documents upon which the Attorney General relied for reasonable cause in instituting this suit against the defendant. The Court further finds from the evidence adduced in the record that the Attorney General did not have reasonable cause to bring this suit against said defendants unless said reasonable cause was shown by said four documents, which the plaintiff refused to produce or to introduce in evidence and which have not been exhibited or shown to counsel for defendant or the Court.

Accordingly the Court does hereby dismiss the complaint herein under the inherent powers of this Court and under rule 41B of the Federal Rules of Civil Practice and with prejudice.

B. The Decision of the Court of Appeals.

The Government filed its notice of appeal the same day, August 7, and on August 26 moved the Court of Appeals to expedite the proceedings. Granting the motion, the court ordered that the appeal be heard on the original record, that the briefing time be accelerated, and that the case be set for argument on October 7, 1969.

On January 27, 1971, the Court of Appeals issued its decision reversing the judgment of the District Court and

remanding the case for further proceedings. The Government had not contested the District Court's finding that the Attorney General had not acted with reasonable cause, nor did the Court of Appeals overrule that finding. Rather, the court held that "the district court erred in sustaining defendant's interrogatories and subpoena duces tecum with respect to determining whether the Attorney General had 'reasonable cause' for belief in what he alleged" (App. 29). The court stated that Section 707(a) does not empower the courts to make a preliminary determination of the Attorney General's finding of reasonable cause; and that a complaint signed by the Attorney General under Rule 11, F. R. Civ. P., is a sufficient showing of "reasonable cause" if the complaint itself contains all the necessary allegations with respect to the existence of a "pattern or practice" of discrimination (App. 28).

This interpretation of Section 707(a) of the Act is buttressed, the court said, by Section 707(b), which requires that Section 707(a) cases be given "expeditious treatment" (App. 28-29): "We think 707(b) is pregnant with an urgency that is incompatible with litigating the Attorney General's reasonable cause belief" (App. 29).

The Court also rejected the Union's claim that, regardless of the litigability of reasonable cause, the order of dismissal should be affirmed because the subpoenaed material the Government refused to produce contained, by the Government's own admission, "relevant information concerning the issues in this case" as the Government defined them (Vol. II, Item 36, pp. 37, 39). The court said the only reason the Union had given in the district court for the production of those documents was that they bore on "reasonable cause" (App. 29). If, on remand, the Union can show a "broader purpose," the court said, the district court "may then examine the documents *in camera* at trial—as it indicated it intended to do with respect to

the reasonable cause issue—and determine if the documents in question are privileged and whether "good cause" has been shown for their production" (App. 30).

On February 24, 1971, the Union petitioned for rehearing, and suggested a rehearing *en banc*. The petition was denied without opinion on March 16.

REASONS FOR GRANTING THE WRIT.

I. THE HOLDING OF THE COURT BELOW, THAT REASONABLE CAUSE IS NOT A LITIGABLE ISSUE AND NOT SUBJECT TO DISCOVERY, IS CONTRARY TO THE INTENT OF CONGRESS AND TO APPLICABLE DECISIONS OF THE COURT.

The Attorney General's authority to institute a civil action under Title VII of the Civil Rights Act of 1964 is set forth in Section 707(a):

> Whenever the Attorney General has *reasonable cause* to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States * * * [emphasis added].

On the basis of the evidence adduced by discovery, the District Court found that the Attorney General did not have reasonable cause to bring this action (App. 34). The Government did not take issue with that finding on appeal. Rather, the Government argued, and the Court of Appeals held, that reasonable cause was not a litigable issue, and its existence could not be made the subject of discovery. The decision of the Court of Appeals means that the Attorney General may bring an action under Section 707(a) of the

Act even if, contrary to the statutory mandate, he does not have reasonable cause to do so, but is merely acting on suspicion or surmise, or for some arbitrary reason.

The statutory prerequisite of "reasonable cause," however, was never intended by Congress to be satisfied by the Attorney General's simple assertion that it exists, even though it in fact does not. Rather, it was intended by Congress to safeguard the rights of private persons generally to be free from arbitrary and capricious government action and abuse of governmental process.[2] Senator Dirksen, one of the authors of this section of the Act, emphasized in his statement presenting this section to the Senate the limitation it imposed on the power of the Attorney General to file such suits. He said (110 Cong. Rec. 12381-5, June 5, 1964, BNA, p. 294):[3]

> New Section 707(a) and (b): This is a new section based on a pattern or practice of resistance to the full enjoyment of any rights secured by this title, provided that the pattern or practice is of such a nature and is intended to deny the full exercise of those rights. This action can be brought only by the Attorney General, *who must have reasonable cause to believe* that the pattern or practice exists, and is of the nature and is intended to deny the exercise of those rights. [Emphasis added.]

Such a limitation, when expressly imposed by Congress, is one which Congress obviously intended to have meaning, and which can have meaning only if the existence of reasonable cause is subject to judicial review. Cf. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F. 2d 807, 812-813

2. Cf. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 213 (1946): "Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."

3. "BNA" refers to *The Civil Rights Act of 1964* (Bureau of National Affairs, Washington, D.C., 1964), a book containing the text and legislative history of that Act.

(C. A. 6, 1961). For, to permit the Attorney General to act without reasonable cause, in admitted disregard of the statutory requirement that he act only when he does have reasonable cause, "would but grant to the [Attorney General] the congressional power of repeal." *Office Employees International Union* v. *N. L. R. B.*, 353 U. S. 313, 320 (1957).[4]

A recent decision of this Court also indicates that the actual existence of reasonable cause is a necessary prerequisite to the Attorney General's exercise of the authority to litigate. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), the Court was called upon to determine under what circumstances a private party is entitled to attorney's fees when he prevails in a suit under Title II of the Act, which deals with public accommodations. During the course of the decision, the Court pointed out that the Act was so structured "that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law" (*id.*, at 402), and observed in a footnote (*id.*, at 402, n. 2):

> * * * Only where a "pattern or practice" of discrimination is reasonably believed to exist may the Attorney General himself institute a civil action for injunctive relief. 42 U. S. C. § 2000a-5.

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4. The Court of Appeals cited a statement by Congressman Celler, floor manager of the Senate-approved bill in the House, that "the issue of reasonable cause does not present a litigable issue" (App. 28, n. 3). Congressman Celler, however, did not participate in drafting this section of the Act; that was done in the Senate by Senators Dirksen and Mansfield. See *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, p. 1016, prepared by the Equal Employment Opportunity Commission and published by the Government Office. Hence, Congressman Celler's view is entitled to very little weight as an expression of Congressional intent.

The Title II provision cited is a verbatim duplicate of Section 707(a) (42 U. S. C. § 2000e-6(a)).[5]

The import of the Court's statement is clear: the Attorney General is without power to bring a suit under Title II—and therefore under Title VII—unless he can show reasonable cause to believe that an accused party is engaged in the most serious kind of conduct—a pattern or practice of deliberately discriminatory behavior of a repeated and generalized nature. And it is settled law that when such a limitation is imposed on governmental action, the existence of "reasonable cause to believe" is subject to challenge as a preliminary matter in the courts. See, e.g., *Barlow* v. *Collins*, 397 U. S. 159, 165-166 (1970); *United States* v. *Zucca*, 351 U. S. 91, 98-909 (1956); *N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325-326 (1951); *Crowell* v. *Benson*, 285 U. S. 22, 54-55 (1932); *United States* v. *St. Regis Paper Co.*, 355 F. 2d 688, 695 (C. A. 2, 1966). Cf. *Goldberg* v. *Truck Drivers Local Union No. 299, supra.*

The court below concluded that reasonable cause was not litigable because three district courts had ruled that

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5. Like Title II, Title VII was so structured by Congress that the Attorney General has but a limited role in the effectuation of the policies contained therein. Primary responsibility is vested in the EEOC by providing that enforcement of equal employment opportunities in employment be initiated almost exclusively by the filing of charges by individuals or a commissioner of the EEOC (42 U. S. C. § 2000e-5(a)). Only after the EEOC has had an opportunity to resolve the charge by conciliation may an individual complainant bring a court action based on his charge. In such a situation, Congress did not impose on him the same limitation it imposed on the Attorney General—i.e., there is no requirement that a private individual have reasonable cause to believe that his charge is true in order for him to maintain his action in court. *Fekete* v. *United States Steel Corp.*, 424 F. 2d 331 (C. A. 3, 1970). Like any ordinary piece of civil litigation, an individual may bring a suit under Title VII of the Civil Rights Act of 1964 even if he has no cause to do so. Congress, however, expressly denied such power to the Attorney General when it provided that he could bring a suit only when he had "reasonable cause to believe" that the most serious type of violations had occurred.

way.[6] None of those decisions, however, presented any discussion of the issue, but merely asserted that the Act "does not contemplate that the courts shall make a preliminary determination of the Attorney General's finding of reasonable cause" (*United States* v. *Building & Construction Trades Council, supra,* 271 F. Supp. at 453). Citing *United States* v. *Gustin-Bacon Div., Certain-Teed Prod.,* 426 F. 2d 539 (C. A. 10, 1970), the court below also said that a sufficiently well-pleaded and signed complaint would fulfill the statutory prerequisite of reasonable cause by operation of Rule 11, F. R. Civ. P. A similar argument was made by the Government in *United States* v. *Zucca, supra,* and rejected by the Court on the ground that where the governing statute itself requires an independent showing of reasonable cause, a complaint—even a verified complaint—is not enough. The reasoning in *Zucca* is equally applicable here.

As an additional reason for holding that reasonable cause is not litigable, the Court of Appeals cited the hortatory declaration in Section 707(b) that the judge to whom a Title VII case is assigned shall "assign the case for hearing at the earliest practicable date and . . . cause this case to be in every way expedited (App. 28). It is ironic that the court below, which took more than 15 months to decide this appeal, should rest its decision that reasonable cause is not litigable on the ground that to allow that issue to be litigated would delay the case. In any event, litigating the issue of reasonable cause need not cause unnecessary delay. In litigation such as the case at bar, both parties seek to engage in extensive and time-consuming discovery. Since the power to regulate discovery is

6. *United States* v. *Building & Construction Trades Council,* 271 F. Supp. 447, 452 (E. D. Mo., 1966); *United States* v. *I. B. E. W., Local 683,* 270 F. Supp. 233, 235 (S. D. Ohio, 1967); *United States* v. *I. B. E. W., Local 309,* Civil No. 69-10 (E. D. Ill., filed July 2, 1969).

vested in the trial judge, it is entirely possible for him to control discovery so as to avoid delay while, at the same time, determining the reasonable cause issue.[7] Such judicial procedure could give full implementation to the "urgency" with which Section 707(b) is "pregnant" without sacrificing the reasonable cause safeguard written into Section 707(a).

In sum, the decision of the Court of Appeals regarding the litigability of reasonable cause is erroneous, and presents an important issue in the administration of the Civil Rights Act of 1964 which only this Court can resolve.

II. THE COURT OF APPEALS IMPROPERLY AND ERRONEOUSLY VACATED THE DISTRICT COURT'S ORDER OF DISMISSAL DESPITE THE ATTORNEY GENERAL'S DELIBERATE REFUSAL TO PRODUCE NECESSARY AND RELEVANT DOCUMENTS.

In addition to dismissing the complaint for lack of reasonable cause, the District Court also dismissed the complaint because the Government repeatedly refused to comply with the court's order directing it to produce certain documents for *in camera* inspection to determine whether they should be given to the Union pursuant to a trial subpoena. The Court of Appeals, while concluding that the lower court erred in dismissing the suit, held that the trial court may require the Government to produce the documents for *in camera* inspection at trial—the same order which had resulted in dismissal when the Government refused to comply. Thus, the Court of Appeals gave the Government still another chance to comply with an originally lawful order—a chance which other litigants are not afforded.

7. See, e.g., suggestions for separate schedules for discovery on a class action issue and the merits of the case, sequence of discovery and other judicial control in complex cases. *Manual for Complex and Multi-district Litigation*, West Pub. Co., St. Paul, Minn., 1970, Section 0.5, 1.5-1.8.

The court below sought to justify its action on the ground that the Union only sought the documents in question because they were relevant to the issue of reasonable cause, and that the District Court ordered their production because of its belief that the documents were necessary in order to determine if the Attorney General had reasonable cause to bring the action (App. 29-30). The appellate court concluded that since reasonable cause was not a litigable issue, the District Court erred in not quashing the subpoena insofar as it sought documents relating to that point.

Acknowledging the Union's claim that it had also been seeking those documents in connection with other issues in the case, the court below ruled that this was a new argument, and that the District Court could consider it on remand. The record shows, however, that at all times during the course of the proceedings, the Government was aware that the documents the Union was seeking were relevant to the litigable issues *as the Government defined them,* and that the Government's adamant refusal to produce those documents were not based on any misapprehension as to the relevance of those materials to the concededly litigable issues in the case. The Union's Interrogatory No. 52, which the Government answered without objection (although it did object to Interrogatory No. 11, dealing with reasonable cause), asked for all "documents which contain *relevant information concerning the issues of this case*" (Vol. II, Item 8 emphasis added). In response to this Interrogatory, the Government listed, *inter alia:*

> a written statement taken by the government from one person, and memoranda of interviews with seventeen others; four memoranda prepared by attorneys of the Civil Rights Division before this suit was initiated "summarizing available information concerning Local One and its Joint Apprenticeship Committee and making recommendations regarding actions to be

taken;" and investigative reports prepared by government agents in the case. [App. 29, n. 4.]

Thus, by the Government's own admission, these documents sought bore on the issues of the case as the Government defined them—not just on the issue of reasonable cause. These were the documents the Union requested in the trial subpoena. The fact that the Government objected to interrogatories relating to "reasonable cause," but answered without objection Interrogatory No. 52, shows that the documents contained "relevant information concerning the issues of this case" irrespective of any information they may contain on the question of reasonable cause.

Although refusal of the Government to produce those documents precluded the Union from discovering the specific facts therein and how they bear on the issues, the trial court was aware that they did relate to the merits of the case (See Tr. 8/6/69, pp. 56-58). Indeed, the Union's counsel argued that additional good cause for their production could be found in the fact that the Government had not fully produced all the information available to it prior to complaint, although such information had been requested in discovery, and that the Government had produced only information it believed supportive of its case (Tr. 8/6/69, pp. 91-97, 124-125, 197, 200). Thus, it was conceivable, although not provable without production, that the information contained in the subpoenaed documents is relevant to the Union's defense and it is for that reason that the Government is so strenuously resisting disclosure. On August 6, 1969, Judge Perry articulated his belief as to the necessity for full production irrespective of the reasonable cause issue (Tr. 8/6/69, pp. 18-19):

> Our whole system of adversary proceeding is based on the right of full discovery.
>
> If you take that position, then the integrity of the FBI is challenged every time some attorney says,

> "You say you have submitted to us all of the reports under Section 3500. We want to examine the FBI agent himself and find out from him whether he did that. We want to question him. We do not want to take the district attorney's word, nor that of the Director of the Department."
>
> They do not do it and the Supreme Court has held they are not required to. They make further inquiry into every step and cross-examine them on it.

In the face of the Government's refusal to produce the documents, even under the safeguards offered by the trial judge, the District Court could reasonably rely upon the Government's admission that the documents sought were relevant to the case and thus rule, without abusing its discretion, that there was good cause for production.

It is well settled that a court has the power to dismiss an action in which a plaintiff—including the Government—refuses to comply with its order. See, e.g., *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La., 1949), aff'd 339 U. S. 940; *Sperandeo* v. *Milk Drivers and Dairy Employees Local Union No. 537,* 334 F. 2d 381 (C. A. 10, 1964). As plaintiff, the Government is clearly subject to Rules 34 and 41(b), F. R. Civ. P., and must, on pain of dismissal, comply with court orders directing it to produce documents. *United States* v. *Procter & Gamble Co.,* 356 U. S. 677 (1958); *United States* v. *Cotton Valley Operators Committee, supra; Sperandeo* v. *Milk Drivers and Dairy Employees Local Union No. 537, supra; Mitchell* v. *Bass,* 252 F. 2d 513 (C. A. 8, 1958); *Durkin* v. *Pet Milk Co.,* 14 F. R. D. 385 (W. D. Ark., 1953); *United States* v. *Certain Parcels of Land,* 15 F. R. D. 224, 232 (S. D. Cal. 1953), and cases cited therein.

In *Cotton Valley,* as here, the Government contended in defense of its refusal to produce certain allegedly privileged documents that the Attorney General had the right

to self-determine the question of privilege. The court held that

> to sustain this contention would, in effect, amount to an abdication of the Court's duty to decide the matter and leave it entirely in the hands of the Attorney General; that if the documents were submitted to the Court, with such claims as to privilege as the Attorney General desired to make, they would be considered before allowing counsel to see them and if it appeared, in the Court's judgment, that production of any part thereof would be injurious to public interest, they would be excluded. [9 F. R. D. at 720-721.]

There, as here, when the Government refused even to produce the documents *in camera,* the court dismissed the suit.

In *Mitchell* v. *Bass, supra,* 252 U. S. at 519, the Eighth Circuit, in affirming the lower court's dismissal for refusal of the Secretary of Labor to produce documents pursuant to court order, held that the

> trial court must be given considerable discretion in the determination of good cause. The trial court has more information upon which to act than the appellate court. This is particularly true here as the record of the pre-trial conference is not before us. The Secretary has failed to establish under the record before us that the trial court abused his discretion in determining that good cause existed for the production of the [documents]. There is factual basis for a determination that such information was reasonably necessary for the preparation of the defense.

Mitchell v. *Bass* is clearly applicable to the instant case, for the record herein contains ample support for the District Court's finding that good cause existed for production of the documents, irrespective of the reasonable cause issue. Accordingly, the Court of Appeals clearly erred when it reversed the District Court's order of dismissal and remanded the case so that the Government could have another opportunity to comply with the order directing it

to produce the subpoenaed documents for *in camera* inspection.

CONCLUSION.

The questions posed by the instant case involve a fundamental application and interpretation of Title VII of the Civil Rights Act and deal with an essential element in the administration of justice. In sum, the Attorney General in the instant case has decreed that he has reasonable cause whenever he says he has reasonable cause, and that he can refuse to produce documents where he is the plaintiff without fear of dismissal of his action; neither the proscriptions of Congress nor the prescriptions of the Federal Rules of Civil Procedure can be applied to him. These views of the Attorney General, which are so inconsistent with the basic strictures of American juridical history and policy require that this Court review the decision below.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 17879 September Term, 1970 September Session, 1970.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL No. 1,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 27, 1971.

Before DUFFY, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

KILEY, *Circuit Judge.* This action was brought by the United States Attorney General by virtue of Section 707(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-6,[1]

1. § 2000e-6. Civil actions by the Attorney General—Complaint (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

alleging that defendant Association[2] discriminated against Negroes in its membership, employment, and recruiting practices. Injunctive relief was sought to restrain future discrimination and to dispel the effects of past discrimination.

The Association answered, *inter alia,* that the Attorney General did not have "reasonable cause to believe" that the Association "is engaged in the alleged discrimination." The Association then moved to strike certain parts of the complaint. The motion was granted.

The government moved for production of certain documents relating to practices of the Association prior to July 2, 1965, and served interrogatories on the Association pertaining to certain pre-1965 practices and to nepotistic practices of the Association. The district court refused to grant this discovery.

The Association thereafter moved to dismiss with prejudice on the interrelated grounds that the government refused to produce documents sought by the Association in support of its "no reasonable cause" defense and that it had failed to show that the Attorney General had reasonable grounds to bring the suit. The district court granted the motion and entered judgment, and the government has appealed. We reverse and remand.

I.

Section 707(a) provides that upon a reasonable cause belief the Attorney General may file a "complaint . . . signed by him" setting forth facts pertaining to the alleged discrimination in employment practices and seeking appropriate relief. We think the plain words of the statute disclose that the district court erred in its view that a de-

2. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 1.

fendant may have a pre-trial inquiry into the factual basis of the Attorney General's "reasonable cause" belief.

Federal courts have consistently held that the Attorney General need not plead his "reasonable cause to believe" that discrimination exists. *United States* v. *Building & Const. Tr. Coun. of St. Louis, Mo.*, 271 F. Supp. 447, 452 (E. D. Mo. 1966); *United States* v. *IBEW Local 638*, 270 F. Supp. 233, 235 (S. D. Ohio 1967). Other district courts have denied motions for interrogatories aimed at discovery of the factual basis for determination of the Attorney General's reasonable cause belief. *United States* v. *IBEW Local 309*, Civil No. 69-10 (E. D. Ill. filed July 2, 1969); *United States* v. *Building & Const. Tr. Coun. of St. Louis, Mo., supra.*

In *United States Building & Const. Tr. Coun.*, the court stated:

> The statute does not contemplate that the courts shall make a preliminary determination of the Attorney General's finding of reasonable cause. Rather, the court's function is to determine whether the defendants have, in fact, engaged in a "pattern or practice" [of racial discrimination], and to do so as expeditiously as possible. 271 F. Supp. at 453.

We agree with this construction of the statute. The purpose of Section 707(a) is to authorize the Attorney General to bring a federal suit where a "pattern or practice"—rather than a single, isolated act—of racial discrimination is present in an employment practice. The only issue for the court, therefore, is whether there has been a violation of the statute and not whether the Attorney General had reasonable cause to believe there was a violation. *United States* v. *IBEW Local 309, supra.*[3]

3. The legislative history of Section 707 supports the view that the Attorney General's "reasonable cause" belief is not a litigable issue. For example, Congressman Celler, the floor manager in the

A sufficient complaint, by its substantial allegations with respect to the existence of a "pattern or practice" of discrimination, will clearly demonstrate the basis of the Attorney General's "reasonable cause to believe." *United States* v. *Gustin-Bacon Div. Certain-Teed Prod.*, 426 F. 2d 539 (10th Cir. 1970). And, under the provisions of Rule 11, Federal Rules of Civil Procedure, a signature on such complaint constitutes a certification that there is "good ground to support" the allegations that a pattern or practice of racial discrimination exists. *United States* v. *IBEW Local 683, supra.*

We think that this view that the government is not required to plead or litigate the reasonable cause belief is consistent with the provisions of Section 707(b) for expeditious treatment of Section 707(a) suits. As pointed out by the Tenth Circuit in *Gustin-Bacon,* the provision in sub-section (b) that "'[i]t shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date *and to cause this case to be in every way expedited*' . . . makes it abundantly clear that these controversies are of great urgency and must be disposed of promptly." 426 F. 2d at 543. And the paragraph immediately preceding that quoted part of Section 707(b) provides that "[i]t shall be the duty of the chief judge of the district . . . in which the case is pending *immediately* to designate a judge in such district to hear and determine the case." (Emphasis added.) Also, if no district judge is available and that fact is certified to the chief judge of the circuit, he shall designate a "district or

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House, stated: "Finally, the statute contains the usual directive to the Attorney General that he should have reasonable cause before he sues, but of course, he—not the court—decides whether reasonable cause exists, and the issue of reasonable cause does not present a separate litigable issue." 100 CONG. REC. 15895 (1964).

circuit judge of the circuit'' to hear the case. We think 707(b) is pregnant with an urgency that is incompatible with litigating the Attorney General's reasonable cause belief.

We hold that the district court erred in sustaining defendant's interrogatories and subpoena duces tecum with respect to determining whether the Attorney General had ''reasonable cause'' for belief in what he alleged. It follows that the court erred in dismissing the government's suit.

The Association contends that the discovery sought—and refused by the government—has a broader aim than the mere ''reasonable cause'' determination.[4] However, the record does not support this contention. At the hearing held on the Association's motion to produce the documents, the Association argued that the documents were needed because they would reveal if the Attorney General had any basis for his reasonable cause determination. The district court then denied the motion ''without prejudice to the right of defendants to have such documents produced at trial.'' The Association thereafter served upon plaintiff's counsel a subpoena duces tecum returnable on the date of trial and covering the documents subject to the discovery motion. At a hearing on the government's later motion to modify the subpoena, both the court and the Association stated that the documents in question were relevant to the ''reasonable cause'' issue. On August 7,

4. The Association sought, *inter alia*, a written statement taken by the government from one person, and memoranda of interviews with seventeen others; four memoranda prepared by attorneys of the Civil Rights Division before this suit was initiated ''summarizing available information concerning Local One and its Joint Apprenticeship Committee and making recommendations regarding actions to be taken;'' and investigative reports prepared by government agents in the case.

1969 the court dismissed the suit, setting forth its reasons in a minute order of the same date. The order, in referring to the documents, described them as "the four documents upon which the Attorney General relied for reasonable cause in instituting this suit." The court then dismissed the action, apparently on the double grounds of "failure of the plaintiff to show that the Attorney General had reasonable grounds or cause to institute this action against defendant and further for the refusal of the plaintiff to produce four documents upon which the Attorney General relied for reasonable cause."

The district court apparently thought defendants had shown "good cause"[5] for discovery by its argument that the documents were necessary in order to determine if the Attorney General had "reasonable cause;" the court then ordered their production and dismissed the cause upon the government's refusal to produce.

The subpoena should be quashed in so far as it seeks documents for challenging the Attorney General's reasonable cause belief. Upon remand, the court shall determine if the defendant has shown broader purpose which it asserted in this court. If the defendant makes a proper showing, the court may then examine the documents *in camera* at trial—as it had indicated it intended to do with respect to the reasonable cause issue—and determine if the documents in question are privileged and whether "good cause" has been shown for their production. In aid of the remand, we refer to Judge Cummings' opinion for the court in *Natta* v. *Zletz*, 418 F. 2d 633 (7th Cir. 1969), as to the viability of the rule in *Hickman* v. *Taylor*, 329 U. S. 495 (1947).[6]

5. See former Rule 34, Federal Rules of Civil Procedure.

6. The new Federal Rules of Civil Procedure relating to Depositions and Discovery have been promulgated since the district court's dismissal of the suit. Rule 26(b)(3) establishes guidelines for the discovery of trial preparation materials.

II.

The district court struck from the complaint a paragraph,[7] and the corresponding prayer for relief, alleging that the Association implemented its discriminatory policy and practices by discriminating against Negroes in recruiting members and by failing to take reasonable steps to eliminate present effects of previous discrimination. This ruling was erroneous. We think the allegations with respect to recruiting are relevant and, if proven, constitute a violation of Section 703(c), 42 U. S. C. § 2000e-2(c), *United States* v. *Plumbers Local 73,* Civil No. 68-C-45 (S. D. Ind. filed Aug. 15, 1969), *Dobbins* v. *IBEW Local 212,* 292 F. Supp. 413 (S. D. Ohio 1968); and accordingly should not have been struck. 2A Moore Federal Practice § 12.21. The allegation with respect to removing the *present effects* of past discrimination is likewise relevant since it is proper for a court to look at past discrimination to see whether an employer is perpetuating a pattern of discrimination through other means and, if so, require the defendant to remedy the present effects. *Heat & Frost Insulators Local 53* v. *Vogler,* 407 F. 2d 1047 (5th Cir. 1969); *United States* v. *Papermakers Local 189,* 282 F. Supp. 39 (E. D. La. 1968); *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E. D. Va. 1968).

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7. The paragraph struck reads:

8. The policy and practice referred to in the preceding paragraph has been implemented by Local No. 1, among other ways, as follows:

(a) By failing and refusing *to recruit* and accept Negroes as members of the union upon the same basis as white persons are *recruited* and accepted.

* * * * *

(c) *By failing and refusing to take reasonable steps to eliminate the effect of its previous policies and practices of discrimination on the basis of race.*

III.

The district court erred also in limiting the government's pre-trial discovery to the period after July 2, 1965, the effective date of the statute. In our view the past sheds light on the present as well as the future. Past discrimination, even if lawful, may be relevant to show motive and intent as to present practice or to establish a pattern or practice of discrimination or to show that present—seemingly innocent—practices are designed to perpetuate or have the effect of perpetuating a past policy of discrimination. *Heat & Frost Insulators* v. *Vogler, supra; United States* v. *IBEW Local 309,* Civil No. 69-10 (E. D. Ill. filed July 2, 1969); *United States* v. *Building & Const. Tr. Coun. of St. Louis, Mo.,* 271 F. Supp. 454, 459 (E. D. Mo. 1966).

The court erred also in sustaining defendant's objection to plaintiff's interrogatories with respect to alleged nepotistic practices resulting in discrimination that excluded Negroes from Association membership. A union which has only white members can effectively preclude non-whites from membership by giving preference in admission to relatives of members. The court therefore erred in denying the discovery sought. *Heat & Frost Insulators* v. *Vogler, supra; United States* v. *Plumbers Local 73, supra.*

For the reasons given, the judgment is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable Joseph Sam Perry.

Cause No. 68 C 676 Date Aug. 7, 1969

Title of Cause

United States v. International Bridge & Iron Workers Local 1.

Brief Statement of Motion

Cont'd hearing on Motions.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

This cause coming on upon the motions of defendant to dismiss this cause for failure of the plaintiff to show that the Attorney General had reasonable grounds or cause to institute this action against the defendant and further for the refusal of the plaintiff to produce four documents upon which the Attorney General relied for reasonable cause after they had been subpoenaed by defendant and ordered to be produced by the Court, said refusal being based upon the claim of Executive Privilege asserted and ordered by the Attorney General.

The Court thereupon has considered said motions and response thereto and heard argument of counsel for the parties and now finds as follows:

The plaintiff has followed and continues to follow the

instruction of the Attorney General and has refused and continues to refuse to produce said four documents for inspection by counsel for the defendant or the Court and has continued to and continues to assert the Attorney General's claim of Executive Privilege as to said four documents, the four documents upon which the Attorney General relied for reasonable cause in instituting this suit against the defendant. The Court further finds from the evidence adduced in the record that the Attorney General did not have reasonable cause to bring this suit against said defendants unless said reasonable cause was shown by said four documents, which the plaintiff refused to produce or to introduce in evidence and which have not been exhibited or shown to counsel for defendant or the Court. Accordingly the Court does hereby dismiss the complaint herein under the inherent powers of this Court and under rule 41B of the Federal Rules of Civil Practice and with prejudice.

/s/ J. S. PERRY, *Judge.*

(Copied from original order in handwriting of J. S. Perry, Judge.)